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In the Supreme Court of the United States

October Term, 1975
No. 75-9491

IOANA DRAGANESCU, et al.,

Petitioners

-vs-

FIRST NATIONAL BANK OF HOLLYWOOD,

Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

JOHN R. VINTILLA,
Hanna Building,
Cleveland, Ohio 44115,
Counsel for Petitioners.

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In The Supreme Court of the United States

October Term, 1975

No:

ICANA DRAGANESCU, et al.,

Petitioners

-vs-

FIRST NATIONAL BANK OF HOLLYWOOD,

Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on October 21, 1975.

OPINIONS BELOW

The District Court entered an order dismissing the plaintiff's action with prejudice and the Court of Appeals affirmed in a per curiam decision. Both are annexed in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals for the Fifth Circuit was entered on October 21, 1975. This Court's jurisdiction is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Where District Court, at pre-trial conference, sua sponte excludes plaintiffs chief attorney from participation at trial and as attorney of record by reason of the per se application of the provisions of the Code of Professional Responsibility, and where plaintiffs are unable to engage other counsel,

may District Court dismiss the plaintiffs' action with prejudice for want of prosecution?

2. Whether resort to the court for vindication of a legal right may be indirectly barred by the per se application of the provisions of the Code of Professional Responsibility.

STATUTORY PROVISION INVOLVED

32 Fla. Stat. Ann. 127 (Supp 1974), Code of Professional DR 5-101(B) and DR 5-102(A), appear in the Appendix.

STATEMENT OF THE CASE

The parties will be referred to as they appeared in the District Court - petitioners being the plaintiffs and the respondent a defendant.

A diversity suit was instituted by citizens of Romania against the First National Bank of Hollywood, Florida, and a former employee in the District

Court for the Southern District of Florida by attorney John R. Vintilla of Cleveland, Ohio. Local counsel was associated to comply with local rule of court. The pleadings, motions, briefs and all substantial activity connected with the proceedings were handled by plaintiffs' out-of-state counsel. On the eve of trial, a pre-trial was scheduled and held. Plaintiffs' lawyer did not attend the pre-trial meeting due to an impending surgery. A timely request for postponement was denied. During the pre-trial meeting, the District Judge learned that plaintiffs' counsel may have some testimony to give at the trial on behalf of his clients. This prompted the District Judge to declare and order, instanter, that plaintiffs counsel could no longer act on behalf of, and is excluded as the afforney for, the plaintiffs. An appeal from this order was taken to the Court of Appeals, and the adverse decision of that court (502 F 2d 550) was brought here for a writ of certiorari. This court denied the petitioners request

for certiorari on April 21, 1975. Shortly thereafter, on June 5, 1975, the District Court re-scheduled the case for trial and dismissed the action with prejudice for want of prosecution. No appearance was made at the trial on behalf of the plaintiffs because of the order excluding their chosen counsel, and the withdrawal of local counsel. (Appendix - Exhibit F & G). An interim request to the District Judge to recommend a list of lawyers from whom plaintiffs could select local counsel was ignored. (Appendix - Exhibit E). The Court of Appeals affirmed the dismissal of plaintiffs case per curiam, without opinion.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL AS TO THE PROPER APPLICATION OF THE CODE OF PROFESSIONAL RESPONSIBILITY.

The testimony of a lawyer on behalf of his client is not incompetent per se in the federal

court. French v. Hall, 119 U.S. 152, 154; City Bank of Honolulu v. Rivera Davila, 438 F. 2d 1367, 1369 (1st Cir. 1971); Bank of America v. Saville, 416 F. 2d 265, 272 (7th Cir. 1969), cert denied, 396 U.S. 1038 (1970); United States v. Fiorillo, 376 F. 2d 180, (2d Cir. 1967). The provisions of the Code of Professional Responsibility are not per se rules. Their application necessarily depends "upon the attending facts" in each case. ABA Comm. On Professional Ethics, Informal Opinion, No. 339 (November 16, 1974). Autowest Inc. v. Peugeot, Inc., 434 F. 2d 556, 568 (2d Cir. 1970). The rule to be adopted by the court is to be determined by the circumstances of each case. The critical question which arises when these provisions are invoked is not whether a lawyer who is trial counsel may appear as a witness at some point in the trial, but whether the litigation can be conducted "in fairness" and the parties "properly represented" if the lawyer's testimony is

offered. The logical and established rule regarding this issue as revealed by the decisions of other federal courts is that the Code of Professional Responsibility does not automatically require disqualification of a lawyer because he may appear as a witness on behalf of his client.

The thrust of the code of ethics invoked by the District Court is the avoidance of prejudice at the trial. The Fifth Circuit, in its rulings on two occasions in this same case, approved the application of the provisions of the Code of Professional Responsibility as per se rules, and, more seriously, it condoned the application of those provisions in an unconstitutional manner. These rulings by the Court of Appeals constitute compelling reasons why some definitive guidelines in the application of the Code of Professional Responsibility should now be marked by this Court.

THE DECISIONS BELOW CONTRADICT THE RECENT PRONOUNCEMENTS OF THIS COURT CONCERNING THE REGULATION OF ATTORNEYS VISAVIS THE CONSTITUTIONAL RIGHTS OF LITIGANTS.

We borrow from the language of the opinion of the very court whose decision is hereunder challenged, to reflect the seriousness of the error of that court in affirming the dismissal of the plaintiffs' action, Lefton v. City of Hattiesburg, Mississippi, 333 F. 2d 280 (1964). At page 285 of the opinion on Lefton, the court stated:

> "Federal as well as state courts must be guided in this matter of local rules by the recent decisions of the Supreme Court concerning regulation of attorneys. The Court has said that 'A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest'. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 84 S. Ct. 1113, 1117. This principle applies with a special force where it is a federal court, and not a state, whose

> regulations may interfere with law-suits authorized by Congress. And where, as here, the basic public interest involved is the protection of fundamental constitutional rights of the petitioners, courts must give special heed to the teachings of the Supreme Court to permit neither indirect nor direct 'means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.' Id., 84 S. Ct. at p. 1117."

The right to counsel of one's choice, we submit, is a federally protected right of due process. That such a constitutional right is accorded to a litigant from a foreign country is beyond dispute. Where a right has been conferred on a person by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion, Spanos v Skouras Theatres Corp., 364 F. 2d 161, 170 (2d Cir. 1966).

The plaintiffs are accorded the right to inherit the estate of their decedent by the laws of Florida. They were deprived of this right by the tortious action of the defendants. To vindicate this

right, the plaintiffs invoked the jurisdiction of the federal court as provided by Section 1332 (a) (2), United States Code. Their interest stems from the constitutionally protected right to seek redress in our courts. Generally, all litigants are entitled to meaningful access to the courts. Such rights as are granted to these plaintiffs by our laws would be illusory if they are denied counsel of their choice or unable to engage competent legal counsel to represent them. NAACP v Button, 371 U. S. 415; Railroad Trainmen v Virginia Bar, 377 U. S. 1 at page 6.

The question here involved is one of law only. The District Judge entered an order sua sponte, at a pre-trial conference, in the absence of plaintiffs' counsel, depriving the attorney of further authority to appear in the case because of the possibility that the attorney may give the court some evidence at the trial of the case. There was no notice that such an issue would be raised at the pre-trial conference,

and there was no opportunity afforded to the interested parties to be heard with regard thereto. All we have is a pre-trial order which shows that the exclusion of plaintiffs' chief counsel as attorney of record was sua sponte, summary and arbitrary. The statement of Mr. Justice Harlan, in his concurring opinion in Chandler v Judicial Council, 398 U. S. at 127, is especially relevant to the action being challenged herein. It reads as follows:

> "There is much in our tradition of due process of law that runs counter to the taking of serious actions on ex-parte assertions or suspicions of misbehavior or incapacity."

As we have seen the action of the District Court has had the effect of denying the plaintiffs not only of the right to legal counsel of their choice, but, in effect, it also deprived them of having any counsel to protect and preserve their rights. Thus, the district court, by indirect means, has barred the

plaintiffs from having meaningful access to the courts to vindicate their legal rights. This, the court has done ostensibly for the purpose of regulating the professional conduct of the attorney for the plaintiffs. We have no dispute with the salutary purpose and objectives of the Code of Ethics. However, the proper application of the provisions of the Code as a factor in the administration of justice is drawn in issue in the instant case. The court acted prematurely, and thus unconstitutionally, in excluding plaintiffs' counsel at the pre-trial stage of the proceedings and in absence of counsel. Conceivably, the developments at and during the trial could render the alleged testimony of plaintiffs' counsel to be unnecessary. Or, if essential, such testimony could be presented by stipulation or in some other manner or fashion whereby it would not substantially prejudice the rights of the adverse parties. In other words, the action of the court was

clearly unnecessary in the interest of justice at the stage in which it was taken. On the other hand, however, the per se application of the ethic provisions under the circumstances revealed by the record violated the fundamental rights of the plaintiffs as secured to them by the Constitution. By excluding counsel chosen by the plaintiffs, the court in effect deprived them of the right to legal counsel. The deprivation of counsel thereby denied the plaintiffs of effective access to the court. As a serious consequence thereof, the disqualification of plaintiffs' chief counsel has dealt a fatal blow to their cause. The answer as to the propriety of the District Court's exclusionary order is aptly given by Mr. Justice Black in his concurring opinion in Gibson v Florida Legislative Commission, 372 U. S., at page 566, wherein he declared:

> "When an otherwise valid legislation is sought to be applied in an unconstitutional manner we do not sustain its application."

We submit there is a dearth of competent lawyers in Florida, and throughout the Country, ready and willing to undertake a case such as the instant one, on a contingent fee basis. The circumstances, as revealed by the record, coupled with the problems of communicating with clients who are not conversant with our language, in a Communist country, with laws, customs and procedures totally alien to ours, could conceivably present obstacles of a serious magnitude to the usual practitioner who is confronted for the first time with such a representation. Thus, it is evident here, as stated by the Second Circuit in Spanos supra, that where the claim "is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication". The exclusion of plaintiffs' out-of-state lawyer, as has been sanctioned in this case, has brought about the extinguishment of the plaintiffs' rights. The

dismissal order of the District Court, affirmed on appeal, presents a substantial federal question. Realistically, the exclusion of counsel in our case resulted from a provincial attitude concerning out-of-state lawyers, disguised as an attempt to facilitate the interests of justice. We see, however, that the bona fide judicial and public interests would have been better served by the encouragement of specially qualified out-of-state counsel in the prosecution of an "unpopular claim". The unrelenting pursuit of this litigation is based upon the principle that a lawyer may not relieve himself of an unfinished representation to the detriment of the client except for reasons of honor and self-respect. The refusal of the lower courts to consider and to protect the constitutional rights of the plaintiffs to legal counsel of their choice, and to meaningful access to the courts, cannot be justified.

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CONCLUSIC N

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully Submitted

JOHN R. VINTILLA,

Counsel for the Petitioners

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 72-809-Civ-NCR

IOANA DRAGANESCU, et al	*	
	*	
Plaintiffs	*	
	*	ORDER OF
vs	*	DISMISSAL
	*	
FIRST NATIONAL BANK OF HOLLYWOOD, et al	*	
	*	
	*	
Defendants	*	

Calendar call was noticed in this case for Thursday, May 22, 1975 and none of the plaintiffs nor counsel for plaintiffs appeared. The case was set for the two-week trial period beginning May 27, 1975 and was specifically set at the calendar call for trial on June 3, 1975 at 1:30 P.M. Mr. Vintilla, counsel for plaintiffs, was aware of this trial date. The Clerk of the Court called the case and defendants and their counsel were present and prepared to

proceed. No one appeared at that time on behalf of plaintiffs.

Plaintiffs have failed to carry out the court order and now have failed to appear for calendar call and have further failed to appear for trial. Their defaults and failure to carry their burdon of proof leaves this court with no alternative, despite its repeated attempts to accommodate the plaintiffs who are non-residents of this country, other than to dismiss the complaint.

Therefore, it is

ORDERED AND ADJUDGED that this action is dismissed with prejudice, costs to be taxed against the plaintiffs.

DONE AND ORDERED this 5th day of June, 1975.

/s/ Norman C. Roettger, Jr.
United States District Judge

cc - John R. Vintilla, Esq.

GH

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO: 75-2922

Summary Calendar *

ICANA DRAGANESCU, ET AL.,

Plaintiffs - Appellants

v.

FIRST NATIONAL BANK OF HOLLYWOOD, ET AL

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Florida

---

October 21, 1975

Before Thornberry, Morgan and Roney, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.

EXHIBIT C

State of Ohio)
) S S AFFIDAVIT
Cuyahoga County)

John R. Vintilla, being first duly sworn, deposes and says that exhibits A, B, D, and E annexed hereto are true copies of the original letters which he addressed and mailed to the named individuals.

Affiant further states that he has contacted five lawyers in the lower court's jurisdiction for the purpose of persuading them to act as local counsel in the instant controversy, but all of them have declined. He then wrote to the District Judge with regard to this problem, exhibit E annexed, but did not receive any response thereto.

Affiant believes from vast experience in similar problems, and therefore, states, that it is impossible to persuade a lawyer to represent claimants residing behind the so-called "Iron Curtain",

and to undertake the responsibility of representing such a claimant on a contingent fee arrangement in a difficult case such as the instant one.

/s/
John R. Vintilla

Sworn to and signed in my presence this 30th day of July, 1975.

/s/
NOTARY PUBLIC

Exhibit A Annexed to Affidavit

May 9, 1975

Robert M. Sutrrup, Esq.
Attorney at Law
Suite 209 Adams Building
2601 East Oakland Park Blvd
Fort Lauderdale, Florida 33306

Re: Estate of Mary Radu

Dear Bob:

I am determined to institute litigation in the Federal Court against the Bank in Hollywood, as indicated to you earlier.

In researching this problem, I am convinced that a cause of action lies against the Bank under the facts of our situation. The general rule states that an attorney who negligently fails to fulfill a client's testamentary directions incurrs liability in tort for violating a duty of care owed directly to the intended beneficiaries. The Romanian heirs, my clients, were the intended beneficiaries of our decedent's estate. Their rights, as such, have been denied to them as a result of the negligence of the attorney for the Bank. If he had carried out the instructions of the decedent regarding the beneficiaries of her estate, as he indicated he would do, or if he had stated to me that he would not or could not do so, my clients would not have been denied their rightful interest in the estate. I am sending you enclosed herewith a copy of the syllabi in a case in which the facts are not as strong as in our situation. I am writing you to inquire whether you would like to act as local counsel in this case. I assume that the city of Hollywood is within the jurisdiction of the United States District Court for the Southern District of Florida.

I shall prepare the Complaint and, if in the meantime you have indicated your approval to join me, I will send you a copy of same.

Sincerely yours,

John R. Vintilla

JRV/jw

enclosure

Exhibit B Annexed to Affidavit

July 18, 1972

Robert M. Sturrup, Esq
Attorney at Law
Suite 209 Adams Building
2601 East Oakland Boulevard
Fort Lauderdale, Florida 33306

Re: Ioana Draganescu, et al
vs
First National Bank of
Hollywood, et al
United States District Court

Dear Bob:

I am sending you enclosed herewith two copies of briefs which were filed in the above matter.

I would like very much to have you join me in this matter. I am confident that ultimately we shall prevail and force a settlement in the least. You will not be imposed upon unnecessarily. If the rulings are unfavorable on the motions, I will appeal then to the Court of Appeals.

As you can learn from the Briefs, the Bank is involved and it cannot escape liability for the conduct of its employee. If it were otherwise, how could an ordinary person know that an employee (trust officer) is not authorized to discuss the preparation of a will, or that he exceeded in duties or authority. The more reasonable position would be and is to place the burden upon the Bank to assume

the responsibility for the proper conduct of its employee. Certainly it is reasonable to expect that if a bank employs one who is licensed as a lawyer, people will come to the bank and consult him, as was done in our case. In any event, I am convinced that the question of the authority of the trust officer is one of fact to be decided by the jury.

I await a reply at your earliest convenience.

Sincerely,

John R. Vintilla

JRV:ps

Exhibit C Annexed to Affidavit

February 22, 1973

John R. Vintilla, Esq.
550 Hanna Building
Cleveland, Ohio 44115

Re: Draganescu v. First National Bank of Hollywood, et al., Case No. 72-809-Civ-NCR

Dear Mr. Vintilla:

The Order of this Court issued February 5, 1973 directed that you comply with Local Rule 10(D). That rule requires the designation of counsel "residing in this district". Therefore, the designation of Mr. Allison does not comply with this Court's Order.

Very truly yours,

Norman C. Roettger, Jr.

Exhibit D Annexed to Affidavit

August 15, 1974

Miller and Russell
Attorneys at Law
Ainsley Building
Miami, Florida

Gentlemen:

I am writing you upon the recommendation of David Walters, Esquire.

There is pending in the United States District Court, Fort Lauderdale Division of the Southern District of Miami, anaction wherein my clients are seeking damages principally against the First National Bank of Hollywood for the misrepresentations of its employee and agent (attorney James F. Schweikert who is no longer with the Bank).

The case has been pending for two years. During a pre-trial conference last November, (which was not attended by me because I was scheduled for an operation) the Judge ordered me out of the case becuase he learned that I may have some testimony to give in the trial.

My motion to amend the pre-trial order to permit me to appear was overruled. In the meantime, a local lawyer who joined me merely to satisfy rule 10(D) 2 of the District Court indicated he would withdraw and that I should find other counsel. The court then scheduled the case for trial, although an appeal from his order was pending in the Court of Appeals. The Judge was of the opinion that his order

was not appealable because it was interlocutory. I then filed with the Court of Appeals a writ of prohibition against the District Judge and this caused him to enter an order postponing the trial until the disposition of the appeal. You will find enclosed a copy of the brief on appeal and of the appendix from which you can glean the essentials of the matter.

Mr. Walters was called by a friend of his here in Cleveland who was familiar with my problems in this case, and who offered to help by calling Mr. Walters. I need a lawyer who is a member of the Federal Bar and resides in the Southern District of Florida, upon whom notice and papers may be served. As you will learn from reading the enclosures, you will find that I am compelled to handle the work alone because there is no money available, and therefore, it would be unfair to impose upon another lawyer to render valuable services on a contingent fee arrangement in such a difficult case. The work I have done thus far comprises three large legal files.

I was informed a few days ago that the appeal will be disposed of summarily. This means that the case could be assigned for trial in October. It is for this reason that I must arrange for substitute counsel without delay.

It is possible that I may come to Florida in September, at which time I would be happy to meet with you. In my opinion, this case offers good possibilities of success by way of settlement or trial once the harassing practices are put to rest.

I await your response with interest at your earliest convenience.

Sincerely,

Exhibit E Annexed to Affidavit

October 9, 1974

Hon. Norman C. Roettger, Jr.
Judge, U. S. District Court
Fort Lauderdale, Florida

Re : Ioana Draganescu et al., v. First National Bank of Hollywood et al. No. 72-809-Civ.

Dear Sir:

In view of the nature of my practice, I am compelled to appeal the adverse decision of the Court of Appeals to the Supreme Court of the United States. I trust, therefor, that you will hold this case in abeyance pending the further appeal. As you know, I am unable to engage competent legal counsel on behalf of my clients in Romania to handle this difficult case on a contingent fee basis. Of course, if your Honor is in a position to recommend a list of local lawyers who would be agreeable to handle the case on a contingent fee arrangement, I shall be happy to advise my clients accordingly.

Your aid and kind attention are appreciated.

Sincerely yours,

Attorney for Plaintiffs

cc: Mr. Jack Weins
Mr. Merle Litman
Mr. John T. Carlon, Jr.

EXHIBIT F

IOANA DRAGANESCU, et al Plaintiff vs. FIRST NATIONAL BANK OF HOLLYWOOD, et al Defendants	United States District Court Southern District of Florida No: 72-809-Civ-NCR ORDER

THIS CAUSE is before the court on the motion of John T. Carlon to withdraw as counsel.

Upon consideration of the record in this cause, it is

ORDERED AND ADJUDGED that the motion of John T. Carlon to withdraw as counsel is granted.

DONE AND ORDERED this 23rd day of May, 1975.

/s/ Norman C. Roettger, Jr.
Judge

EXHIBIT G

IOANA DRAGANESCU, et al	)	United States District Court
Plaintiff	)	
vs.	)	Southern District of Florida
FIRST NATIONAL BANK OF HOLLYWOOD, et al	)	No: 72-809-Civ-NCR
Defendants	)	ORDER

THIS CAUSE is before the court on the motion of William E. Allison to withdraw as counsel.

Upon consideration of the record in this case, it is

ORDERED AND ADJUDGED that the motion of William E. Allison to withdraw as counsel is granted.

DONE AND ORDERED this 22nd day of May, 1975.

/s/ Norman C. Roettger, Jr.
JUDGE

EXHIBIT H

Rule DR 5-101 (B):

A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Rule DR 5-102 (A):

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).

LIBRARY
SUPREME COURT, U. S.

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FEB 25 1976
MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-949

IOANA DRAGANESCU, et al,
Petitioners

vs.

FIRST NATIONAL BANK OF HOLLYWOOD,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

JACK F. WEINS, ESQUIRE
ABRAMS, ANTON, ROBBINS,
RESNICK AND SCHNEIDER, P.A.
Attorneys for Respondent
1935 Harrison Street
Hollywood, Florida 33022

MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
of the
United States

OCTOBER TERM 1975

NO. 75-949

IOANA DRAGANESCU, et al,

Petitioners

vs.

FIRST NATIONAL BANK OF HOLLYWOOD,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

This is the second visit of this case to this Court. This Court denied a Petition for a Writ of Certiorari (421 U.S. 929, 95 S.Ct. 1655, 1975) to the U.S. Court of Appeals for the Fifth Circuit regarding its opinion at 502 F.2d 550, (1974).

The present Petition is directed to an unreported Order of Dismissal entered by the District Court and its affirmance by the Court of Appeals, per curiam, without opinion, both of which are reprinted in full in the Petitioners' appendix.

JURISDICTION

The Petitioners attempt to invoke this Court's jurisdiction under 28 U.S.C., Section 1254 (1). The Respondent believes that this Court lacks jurisdiction because none of the well recognized grounds for granting certiorari are present.

QUESTIONS PRESENTED

I.

MAY A TRIAL JUDGE IN THE EXERCISE OF HIS DISCRETION REMOVE ONE OF THE PLAINTIFFS' ATTORNEYS PRIOR TO TRIAL WHERE THAT ATTORNEY ANNOUNCES HIS INTENTION TO BE A MATERIAL WITNESS FOR THE PLAINTIFFS AT AN ENSUING JURY TRIAL.

II.

IS IT PROPER FOR A TRIAL JUDGE TO DISMISS THE PLAINTIFFS' ACTION WHEN NONE OF THE PLAINTIFFS APPEAR, EITHER IN PERSON OR THROUGH OR WITH COUNSEL, FOR TRIAL AFTER NOTICE.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The Petitioners filed suit against the First National Bank of Hollywood, Florida, a National Banking Corporation, and a former employee for their alleged negligent failure to prepare a will. The action was filed for the Petitioners in the United States District Court for the Southern District of Florida by John R. Vintilla, Esquire, of Cleveland, Ohio. Thereafter, William E. Allison, Esquire, of St. Petersburg, Florida, filed an appearance as additional counsel for the Petitioners. After that, John Carlon, Esquire, of Fort Lauderdale, Florida, filed an appearance as further additional counsel for the Petitioners.

Pursuant to Rule 14-C of the local rules of the United States District Court for the Southern District of Florida, Mr. Carlon met with Respondent's counsel and prepared a pretrial stipulation prior to the pre-trial conference. Thereafter, Mr. Carlon appeared at the pre-trial conference on behalf of the Petitioners.

At the pre-trial conference the District Judge considered the question of whether or not Mr. Vintilla, who was listed in the pre-trial stipulation as a material witness for the Petitioners, could act as trial counsel and also be a material witness. The trial judge, in the exercise of his judicial discretion, determined that Mr. Vintilla could not be a material witness and act as trial counsel.

Thereafter, Mr. Vintilla moved, on behalf of the Petitioners, to amend the District Court Judge's pre-trial order so as to permit himself to act as trial counsel and be a material witness for the Petitioners. The District Court Judge denied this request.

On appeal, the District Court Judge's decision was unanimously affirmed. *Draganescu v. First National Bank of Hollywood*, 502 F.2d 550 (5th Cir. 1974). A Petition for Rehearing was denied. A Petition for a Writ of Certiorari was filed with this Court and was denied. 421 U.S. 929, 95 S.Ct. 1655 (1975).

Thereafter, the District Court set the case for trial and upon the failure of the Petitioners to appear at trial either in person or through or with counsel the District Court Judge dismissed the action. The Court of Appeals affirmed the dismissal of the case per curiam, without opinion. The present Petition for a Writ of Certiorari to this Court followed.

ARGUMENT

This Petition should be summarily rejected because it is nothing more than an attempt to have this Court consider the same issue raised by the Petitioners in their prior petition. After the District Court Judge entered an order precluding Mr. Vintilla from acting as both trial counsel and a material witness in a jury trial, an appeal was taken. In a unanimous opinion the District Court's order was affirmed. 502 F.2d 550 (1974). This court rejected certiorari. 421 U.S. 929, 95 S.Ct. 1655 (1975).

Thereafter the case was set for trial on the District Court's jury docket. When none of the Petitioners appeared for a duly noticed trial either in person or through or with counsel the action was dismissed. On appeal the dismissal was affirmed.

The Petitioners under the guise of seeking a review of the order of dismissal raise the same question that was raised in their prior petition to this court. This time they cite some different cases but they are directed to the same issue, namely, may a trial judge in the exercise of his discretion remove one of the Plaintiffs' attorneys prior to trial where that attorney announces his intention to be a material witness for the Plaintiffs at an ensuing jury trial.

As was noted by this Court in *French v. Hall*, 119 U.S. 152, 7 Sp.Ct. 170 (1886), it is "unseemly" for counsel in a civil action to testify for his client especially if he is in a position to comment on his own testimony, which would be the case here since the Petitioners' requested trial by jury. This Court clearly indicated that this practice should properly be discouraged.

Furthermore, it is broadly recognized that the trial judge is vested with considerable discretion in this area. *French v. Hall*, supra; *Travelers Insurance Company v. Dykes*, 395 F.2d 747 (5th Cir. 1968).

In addition, this issue has previously been decided and cannot be reargued in this Petition. The only legitimate question which can be raised in this Petition is the

District Court's dismissal of the action with prejudice when neither the Petitioners nor counsel appeared for the court's trial calendar call and the trial itself. While this is a proper issue to raise at this juncture it is one without merit. Petitioners' non-appearance for a duly noticed trial (no request for a continuance or postponement was made) is tantamount to a failure to prosecute and the District Court in such circumstances has the inherent authority to dismiss the action. *Linis v. Wabash Railroad Company*, 370 U.S. 626, 82 S.Ct. 1386 (1962); *Hyler v. Reynolds Metal Co.*, 434 F.2d 1064 (5th Cir. 1970), cert. den. 403 U.S. 912, 91 S.Ct. 2219, rehrg. den. 404 U.S. 875, 92 S.Ct. 34.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JACK F. WEINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief was delivered by mail to JOHN R. VINTILLA, Esquire, 550 Hanna Building, Cleveland, Ohio, 44115, Attorney for Petitioners this ____ day of February, 1976.

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